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OAH 4-1302-19919-2

STATE OF MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF TEACHING

In the Matter of the Teaching License of	FINDINGS OF FACT,
Julia O. Lund	CONCLUSIONS AND
	RECOMMENDATION

This matter was heard by Administrative Law Judge Bruce H. Johnson (the ALJ) at the Office of Administrative Hearings in St. Paul on January 6 and 7, 2009.

Bernard E. Johnson, Assistant Attorney General, appeared on behalf of the Disciplinary Committee (Committee) of the Board of Teaching (the Board). Christine L. Clark, Esq, Education Minnesota, appeared on behalf of Julia O. Lund (Licensee or Respondent). The hearing record remained open for posthearing briefs and replies and closed on March 11, 2009, when all post-hearing briefs were received.

STATEMENT OF ISSUES

- 1. Whether the Board may take disciplinary action against the teaching license of Julia O. Lund for engaging in immoral conduct, in violation of Minn. Stat. § 122A.20, subd. 1(a)(1)?¹
- 2. Whether the Board may take disciplinary action against the teaching license of Julia O. Lund for failing to make reasonable efforts to protect a student from conditions harmful to health and safety, in violation of Minn. R. 8700.7500, subp. 2.B?

The ALJ concludes that a preponderance of the evidence failed to establish that the Respondent engaged in immoral conduct in violation of Minn. Stat. § 122A.20, subd. 1(a)(1), but did establish that she failed to make reasonable efforts to protect a student from conditions harmful to the student's health and safety, in violation of Minn. R. 8700.7500, subp. 2.B.

Based on the proceedings herein, the Administrative Law Judge makes the following:

¹ Unless otherwise specified, all references to Minnesota Statutes are to the 2008 edition, and all references to Minnesota Rules are to the 2007 edition.

FINDINGS OF FACT

The Respondent's Teaching Experience

- 1. The Respondent is a native of Ukraine and received her primary and secondary education in the Soviet Union and the former East Germany. Thereafter, she attended the Kiev National Linguistic University where she obtained a Bachelor of Arts degree in English Literature and English as a Second Language in 1999. Respondent is also proficient in the Ukrainian, Russian, and German languages and has worked as an interpreter in both Ukraine and the United States since 1995.²
- 2. Respondent began teaching English as a Foreign Language in Ukraine in 1997. In 1999, she married a U.S. citizen and moved to Wisconsin.³
- 3. After she moved to Wisconsin, the Respondent worked regularly as a substitute teacher at Lakeland Union High School in Minocqua during the 1999-2000 school year. While working there, a male student talked to her in a way that she took to be sexual. Thereafter, the Respondent reported the student's conduct to school administrators and personally admonished the student about talking to her in that way.⁴
- 4. After the student's parents objected to the Respondent's report of the incident, in which she characterized the student's conduct as sexual, the school's administrators instructed her to rewrite her report in a way that omitted any sexual connotations or references to potential harassment by the student. Respondent took that experience to mean that school administrators do not generally regard that type of conduct by students as serious and subject to discipline, and she assumed that teachers were expected to deal directly with those experiences and not report them to school administrators.⁵
- 5. After her year of substitute teaching in Minocqua, the Respondent taught high-school level German part time in Rhinelander, Wisconsin, during the 2000-2001 school year and was subsequently employed as a substitute teacher until 2004. She was well-regarded by the faculty and staff of Rhinelander High School, and colleagues in the Rhinelander German Department considered her to be very professional, educated, and caring and recommended her for other teaching positions.⁶
- 6. In 2004, the Respondent and her husband moved to the Twin Cities area. Thereafter on May 18, 2004, the Board licensed the Respondent as a teacher in the area of K-12 English as a Second Language (ESL or ELL).⁷

² Exhibits (Exs.) B and E; Tr. Vol 2, at 416-418 (Lund).

³ Exhibit (Ex.) L; Tr. Vol 2, at 418-419 (Lund).

⁴ Ex. B; Tr. Vol 2, at 419-421, 428-429 (Lund).

⁵ Tr. Vol 2, at 427-430 (Lund).

⁶ Exs. B-D; Tr. Vol 2, at 419-421 (Lund).

⁷ Ex. A.

- 7. During the 2004-05 school year, the Anoka Hennepin School District hired the Respondent as a probationary teacher, and she taught ESL math courses and an ESL U.S. History course in a new program at Coon Rapids High School.⁸
- 8. The Respondent did not enjoy her year teaching at Coon Rapids High School. Both the program and the staff were new. Respondent believed that the teachers were not provided with the resources and support required for success. That prompted the Respondent to seek other teaching opportunities at the conclusion of that school year.⁹
- 9. The Respondent began teaching ELL classes at Chaska High School in the fall of 2005. She also joined other teachers in a new after-school ESL tutoring/mentoring program, and she received favorable observations and reviews of her work. The Respondent was satisfied with her teaching experience at Chaska High School and planned to continue teaching there indefinitely. Also, during the 2004-2005 school year, the Respondent began a program at the University of St. Thomas for a Master of Arts degree in curriculum and instruction. Subsequently, the Respondent completed that program and received her Masters degree in December 2006.¹⁰

The Respondent's Interactions with Student J

- 10. While teaching at Chaska High School in the late spring of 2006, the Respondent noticed that a certain male student, Student J, appeared to be watching and was deliberately attempting to make eye contact with her. Although the Respondent thought that Student J's behavior was strange, she initially ignored him. Based on Student J's size and apparent age, Respondent thought that he was a senior who would soon be graduating and leaving school.¹¹
- 11. Early in the fall of the 2006-2007 school year, the Respondent again noticed Student J in the school building; he was regularly walking past her classroom and often looking into it. Again, Student J appeared to be watching the Respondent and attempting to make eye contact with her. The Respondent finally confronted Student J about his behavior and asked him to stop. Student J replied that he was unaware that what he was doing was objectionable and asked the Respondent if he was in trouble. The Respondent told him that he was not in trouble.
- 12. Student J stopped walking by the Respondent's room and looking in on her for about a week but then resumed. On October 25, 2006, the Respondent again confronted Student J and told him to call her on her office telephone, believing that he

⁸ Ex. B; Tr. Vol 2, at 432-35 (Lund).

⁹ Exs. F and L; Tr. Vol 2, at 432-436 (Lund).

¹⁰ Exs. G and H; Tr. Vol 2, at 396-397 (Gilbert); Tr. Vol 2, at 444-466 (Lund).

¹¹ Tr. Vol 2, at 446-447 (Lund).

¹² Tr. Vol 2, at 447-452 (Lund).

would be more comfortable talking to her about his behavior over the telephone than in a face-to-face conversation.¹³

- On October 26, 2006, Student J approached the Respondent outside of her classroom and asked her to provide a different telephone number to use when calling her because he was unable to find her office telephone number. Respondent informed Student J that he could obtain her office number on the school website and again indicated that he should call her there. Student J then asked the Respondent for her cell phone number, but she declined to give that number to him. When Student J persisted in asking for a different telephone number, the Respondent gave him the dedicated fax number in her husband's home office. Believing that Student J would subsequently call her on that telephone, the Respondent planned to tell him again that he must stop following her and staring at her. 14
- On the evening of October 26, 2006, Student J called the Respondent on the fax line. The Respondent at first did not realize that the fax phone line was ringing. By the time the Respondent was able to answer the telephone, the fax machine had begun operating and interfered with their ability to hold a conversation. Respondent then asked Student J to call back on that line, and he did. Thereafter, the two of them spoke for 34 minutes before Student J was interrupted by another call on his telephone. Student J subsequently called the Respondent back, and they spoke for an additional 42 minutes. 15
- During those telephone calls, Student J told the Respondent that he had feelings for her and was attracted to her. The Respondent attempted to discourage Student J by informing him that she was married and had two children and that a relationship between them would be impossible. 16
- Initially, Student J's behavior had caused the Respondent to become somewhat fearful of him, but she indicated that her telephone conversations with him had changed her opinion of the situation. She then began seeing Student J as vulnerable and in need of help. Because of the Respondent's previous experience in Minocqua, she did not trust the school administrators to deal with the situation appropriately. She also considered discussing the situation with some of her fellow teachers, but she was uncertain who she could trust with the information.¹⁷
- On October 27, 2006, Student J again appeared in the Respondent's classroom doorway before classes began. The Respondent then realized that Student J had not accepted what she had told him, and that he had not changed his behavior towards her. The Respondent told him to leave her office. In response, Student J agreed to leave but only if the Respondent would call him. Student J then gave the Respondent his cell phone number. After school, the Respondent called Student J on

¹³ Tr. Vol 2, at 452-454 (Lund). ¹⁴ Tr. Vol 2, at 455-457 (Lund).

¹⁵ Ex. 37; Tr. Vol 2, at 461-466 (Lund).

¹⁶ Tr. Vol 2, at 462-466 (Lund).

¹⁷ Tr. Vol 2, at 459-461, 464-465, 466-467 (Lund).

his cell phone using her own cell phone. She did not realize that this would provide Student J with her cell phone number. Although the call was frequently interrupted, they spoke for about 20 minutes.¹⁸

- 18. During that conversation, Student J asked to meet with the Respondent but she refused. The Respondent attempted to impress on Student J that they could not have the kind of relationship that he was pursuing, but the student continued to ask her to meet with him.¹⁹
- 19. On October 30, 2006, Student J again called the Respondent on her cell phone. The call made the Respondent realize for the first time that her use of a cell phone on October 27 had given Student J access to her cell phone number. On that occasion, the Respondent and Student J spoke for more than 40 minutes. During that conversation, Student J continually urged the Respondent to meet him somewhere. Finally, in an attempt to end Student J's persistent attention to her, the Respondent agreed to meet him in person. The Respondent told Student J that they needed to meet in a public place, and suggested the school or the mall. However, Student J declined to meet her in either of those places, and the call ended without agreement as to whether, where, or when they might meet.²⁰
- 20. On October 31, 2006, Student J came into the Respondent's classroom and again asked to meet her outside of the school premises. The Respondent asked Student J to leave her classroom and told him she would call him later. The Respondent called Student J later about noon, and they agreed to meet later that day at a park that the Respondent and her family had previously visited. The park was visible from adjacent homes, and the Respondent believed that the meeting would be brief, since she had two appointments immediately before the meeting and would be taking her children out for Halloween "trick or treating" immediately after the meeting.²¹
- 21. The Respondent arrived at the park at about 5:15 p.m. Student J was already there, and she joined him in the front seat of his parked car. As soon as she entered the car, Student J grabbed her hand and said, "Finally." That behavior frightened the Respondent, and she pulled away from him. Student J asked the Respondent what was wrong, and she replied that they were only going to talk. Student J then proceeded to reiterate to the Respondent that he was attracted to her and he had been waiting a long time to meet with her. ²²
- 22. The Respondent then concluded that Student J was intent on a physical relationship and again tried to explain that there was not going to be a physical relationship between them, that he needed to stop trying to talk to her, and that he needed to stop following her. Student J responded by trying to kiss the Respondent,

¹⁸ Tr. Vol 2, at 467-469, 475-476 (Lund); Ex. 37.

¹⁹ Tr. Vol 2, at 469-471 (Lund).

²⁰ Tr. Vol 2, at 472-473, 475-477 (Lund); Ex. 37.

²¹ Tr. Vol 2, at 478-480 (Lund); Ex. 37.

²² Tr. Vol 2, at 481-483 (Lund).

and she again pulled away from him. She told him he could not try to kiss her and she did not let him try to kiss her again or let him touch either her or her clothing.²³

- 23. The Respondent's meeting with Student J lasted for about 45 minutes, but during part of that time Student J answered cell phone calls and replied to text messages. Since Student J appeared to be disappointed and angry, the Respondent continued talking to him in an effort to ease those feelings. After they began talking, the Respondent was no longer frightened or concerned for her safety. At 6:14 p.m., the Respondent's husband called to remind her that the family was planning to go out "trick or treating" that night. She took the opportunity to conclude her conversation with Student J, and she then left the park.²⁴
- 24. On November 1, 2006, the Respondent sent a text message to Student J telling him that she did not want him to feel bad, and that everything was okay. Over the next week, she sent him a few more messages to the same effect. During that period, Student J continued to watch her and follow her at school, but they did not have any conversations, either by telephone or in person. The Respondent observed that Student J appeared to be angry and upset.²⁵
- 25. The Respondent decided that she should learn more about Student J and discovered that he had posted his profile on MySpace.com, a social networking site that allows users to put information on their own webpage. From Student J's MySpace page, she learned that he had a girlfriend and realized that he had been previously misled her about not having a girlfriend and not dating anyone.²⁶
- 26. The Respondent became upset when she discovered that Student J had misled her about his feelings for her and about his relationship with another student. On November 30, 2006, the Respondent sent Student J a text message in which she told him that she knew about his girlfriend, that she had no hard feelings, and that she did not want things to continue to be awkward between them. She also wrote that she was sorry that coming into his economics class would be awkward, but that it was part of her job.²⁷
- 27. Soon after sending that text message, the Respondent received a number of telephone phone calls and text messages on her cell phone from Student J's cell phone and another number. From the tenor of the communications, the Respondent inferred that Student J's girlfriend had seen Respondent's text message of November 30th, and that this had precipitated the calls. When the Respondent answered one of the calls from Student J, he pretended to not know the Respondent, and he asked her who she was and why she was calling his cell phone. At that point in the conversation, a young woman started using Student J's cell phone, asking in a distraught manner who

²³ Tr. Vol 2, at 483-484, 486-487, 533-534 (Lund).

²⁴ Tr. Vol 2, at 484-486 (Lund).

²⁵ Tr. Vol 2, at 488-489 (Lund).

²⁶ Tr. Vol 2, at 489-492 (Lund).

²⁷ Tr. Vol 2, at 489-493 (Lund); Ex. 38.

²⁸ Ex. 46.

the Respondent was and why she was calling Student J. The Respondent told the young woman to ask Student J, and hung up. The Respondent then turned off her cell phone for the rest of the evening. When she turned on her phone the next morning, she saw that a number of calls had been placed to her from a telephone number that was later identified as belonging to Student J's girlfriend.²⁹

- 28. On December 1, 2006, the Respondent called Student J's cell phone and left a voice mail message saying she was sorry about what happened with the his girlfriend and asking him if they could talk before he did anything. Student J responded by text message stating she had almost ruined his life on the previous day, and that he was going to his dean about the situation. The Respondent replied by text message that both of their lives would be ruined by informing the dean. Student J sent back another angry message, and the Respondent did not respond further. ³⁰
- 29. On December 4, 2006, Officer Mike Kleber of the Chaska Police Department (CPD) received a report from the Chaska High School administration of possible improper conduct between a student and a teacher. CPD initiated an investigation that involved interviewing a number of people, collecting information about the number and duration of telephone calls between Respondent and Student J, and collecting the content of text messages and a social networking site (MySpace) where Student J had established a page.³¹
- 30. On December 6, 2006, two school administrators interviewed the Respondent with a teacher's union representative present. The subject of the interview was the contacts between Respondent and Student J. Throughout the interview, Respondent expressed concern that the nature of her contact with Student J could be misconstrued. During that interview, the Respondent denied that she had ever met Student J outside of school.³²
- 31. On December 7, 2006, Student J was interviewed by a Chaska High School administrator. For the first time, Student J alleged that the Respondent and he had engaged in sexual contact during their meeting in the park at the end of October.³³
- 32. On December 8, 2006, CPD expanded its investigation to include Student J's allegation that the Respondent had sexual conduct with him.³⁴
- 33. On December 13, 2006, the Respondent was charged in Carver County District Court with one felony count of Third Degree Criminal Sexual Conduct based on her alleged sexual contact with Student J on October 31, 2006.³⁵ The charge was

²⁹ Tr. Vol 2, at 492-496 (Lund).

³⁰ Tr. Vol 2, at 497, 505 (Lund); Ex. 43-45.

³¹ Tr. Vol. 1, at 62-69 (Kleber); Ex. 6-23.

³² Tr. Vol 2, at 502-507 (Lund); Ex. 2 and I.

³³ Ex. 24; Ex. J.

³⁴ Exs. 6-23, 25-47.

³⁵ Ex. 4.

subsequently amended on April 3, 2007, by adding two additional felony counts arising from the same incident.³⁶

- 34. On March 7, 2008, the Minnesota Department of Education (MDE) initiated a maltreatment investigation of the Respondent's involvement with Student J. Thereafter, the MDE issued a disqualification against Respondent based on sexual contact between her and Student J. On March 14, 2008, Respondent requested reconsideration of the disqualification.³⁷
- 35. Meanwhile, the Carver County Attorney's office withdrew the two additional felony charges against the Respondent, and the remaining criminal charge was tried before a jury in July 2007. The prosecution case consisted of documentary evidence of cellular telephone calls and text messages, emails, and testimony of witnesses, including the testimony of Student J. The Respondent presented no affirmative evidence at the trial and rested immediately after the prosecution presented its case. Thereafter, the jury acquitted the Respondent of the remaining criminal charge.³⁸
- 36. On July 24, 2008, after the Respondent's acquittal, the MDE reversed its disqualification of the Respondent. The MDE found that there was "not a preponderance of the evidence" that the Respondent had either committed maltreatment of or had had sexual contact with Student J.³⁹

Procedural and Jurisdictional Findings

- 37. Based on news reports in mid-December, 2006, Nancy Triplett, a Teacher Ethics Specialist for the Board, became aware of the allegation of sexual contact between the Respondent and a student. Thereafter, Ms. Triplett began following the police investigation and subsequent criminal proceedings involving the Respondent.⁴⁰
- 38. On August 30, 2007, Ms. Triplett sent the Respondent a letter informing her that the Board was aware of the allegations regarding Student J, and that although the Respondent had been acquitted of the criminal charge, the Board did not require a conviction to proceed with disciplinary action against her teaching license. Triplett invited Respondent to provide her version of the events in controversy.⁴¹
- 39. Thereafter, the Board's Committee recommended disciplinary action against the Respondent based on the allegations that Student J had made.
- 40. On October 1, 2008, the Respondent submitted a letter to the Committee that included information about her teaching experience, the interactions between her and Student J, and her understanding of how teacher-student interactions should be

³⁶ Ex. 5.

³⁷ Ex. M.

³⁸ Tr. Vol 2, at 516 (Lund); Ex. M.

³⁹ Ex. O.

⁴⁰ Tr. Vol. 1, at 46-47 (Triplett).

⁴¹ Ex. 50.

conducted. The Respondent denied having any sexual contact of any sort with Student J.⁴²

41. On September 25, 2008, the Committee issued a Notice and Order for Hearing and Prehearing Conference, and this contested case proceeding ensued.⁴³

Other Findings

- 42. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.
- 43. To the extent that the Memorandum that follows explains the reasons for these Findings of Fact and contains additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.
- 44. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

- 1. The Administrative Law Judge and the Board have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 122A.20. The Notice of and Order for Hearing was proper in all respects, and the Board complied with all relevant, substantive and procedural requirements of statute and rule. This matter is therefore properly before the Board and the Administrative Law Judge.
- 2. Under Minn. Stat. § 122A.20, subd.1(a), the Board is authorized to "refuse to issue, refuse to renew, suspend, or revoke a teacher's license to teach for ... (1) immoral character or conduct"
- 3. Minn. Stat. § 122A.20, subd. 1(a)(1) provides that "immoral character or conduct" are grounds for the Board to revoke, suspend, or deny a teaching license.
- 4. The Committee failed to prove by a preponderance of the evidence that Julia O. Lund demonstrated immoral character or conduct in connection with her interactions with Student J.
- 5. Minnesota teachers are governed by a code of ethics adopted in Minn. R. 8700.7500, which states in pertinent part:
 - Subpart 1. Scope. Each teacher, upon entering the teaching profession, assumes a number of obligations, one of which is to adhere to a set of

⁴² Ex. 51.

⁴³ Notice and Order for Hearing and Prehearing Conference.

principles which defines professional conduct. These principles are reflected in the following code of ethics, which sets forth to the education profession and the public it serves standards of professional conduct and procedures for implementation.

This code shall apply to all persons licensed according to rules established by the Board of Teaching.

Subp. 2. Standards of professional conduct. The standards of professional conduct are as follows:

* * *

- B. A teacher shall make reasonable effort to protect the student from conditions harmful to health and safety.
- 6. The Committee proved by a preponderance of the evidence that Julia O. Lund failed to make reasonable effort to protect Student J from conditions harmful to health and safety within the meaning of Minn. R. 8700.7500, subp. 2.B.
- 7. A basis exists for the Board to impose disciplinary action against the teaching license of Julia O. Lund for her violation of Minn. R. 8700.7500, subp. 2.B.

Based on the Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge RECOMMENDS that the Board of Teaching take such disciplinary action against the teaching license of Julia O. Lund as the Board deems appropriate for her violation of Minn. R. 8700.7500, subp. 2.B.

Dated: April 9, 2009

s/Bruce H. Johnson BRUCE H. JOHNSON Administrative Law Judge

Reported: Digitally Recorded

Transcript Prepared, Two Volumes John R. Brennan, Court Reporter

NOTICE

This report is a recommendation, not a final decision. The Board of Teaching will make the final decision after a review of the record. The Board may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat.

§ 14.61, the final decision of the Board shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Board. Parties should contact Karen C. Balmer, Executive Director, Minnesota Board of Teaching, 1500 Highway 36 West, Roseville, MN 55113, to learn the procedure for filing exceptions or presenting argument.

If the Board fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Board, or upon the expiration of the deadline for doing so. The Board must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

I. Burden of Proof

The Committee is seeking here to impose sanctions on the professional license of Respondent. The standard or proof by which evidence in an adjudicative proceeding is measured serves "to instruct the fact finder on the degree of confidence our society desires the fact finder to have in the correctness of his or her conclusions." In administrative contested case proceedings, "[t]he party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard." Neither Minn. Stat. ch. 122A nor any other statute specifically addresses the standard of proof in teacher license disciplinary proceedings. Thus, the Committee has the burden of proving the facts at issue in this proceeding by preponderance of the evidence.

When the issue is whether a licensing board should impose sanctions on a professional license, the Minnesota Supreme Court has established the standard for sufficiency of evidence that is more rigorous:

Even so, these proceedings brought on behalf of the state, attacking a person's professional and personal reputation and character and seeking to impose disciplinary sanctions, are no ordinary proceedings. We trust that in all professional disciplinary matters, the finder of fact, bearing in mind the gravity of the decision to be made, will be persuaded only by

⁴⁴ Carrillo v. Fabian, 701 N.W.2d 763, 773-74 (Minn. 2005), citing Addington v. Texas, 441 U.S. 418,423 *1979)

⁴⁵ Minn. R. 1400.7300, subp. 5; *In the Matter of Friedenson*, 574 N.W.2d 463, 466 (Minn. Ct. App. 1998).

⁴⁶ In the Matter of Friedenson, supra.

evidence with heft. The reputation of a profession, and the reputation of a professional as well as the public's trust are at stake.⁴⁷

In other words, although *Wang* does not raise the standard of proof, it directs that in deciding a case like this, the fact finder must carefully assess the quality, as well as the quantity, of the evidence, in determining whether the licensing authority has met its burden.

The outcome in this case turns on evidence of interactions between the Respondent and a student who is alleged to have been her victim. Evidence of the Respondent's version of events included her own direct testimony and cross-examination and testimony and documentary evidence of statements she previously made to school authorities and the police, and documentary evidence of telephone conversations and text messages that were exchanged between the Respondent, Student J, and others. On the other hand, Student J was unavailable for direct or cross-examination and his prior recorded testimony at an earlier criminal proceeding was apparently under seal and therefore unavailable. All that was available to establish his version of events was the same documentary evidence of telephone conversations, text messages and hearsay statements made during police interviews, during which he arguably had reason to minimize his own behavior and exaggerate the Respondent's behavior. In other words, application of the *Wang* standard in the context of this case placed even a heavier than normal burden on the Committee.

II. The Committee's Sexual Misconduct Claim

The Committee contends that Respondent had sexual contact with Student J. As noted, most of the evidence in the record supporting that claim consisted of hearsay evidence in police reports of statements that Student J had made and the testimony of some of the police officers who conducted those interviews. Hearsay may be considered in an administrative proceeding if it is the sort of evidence upon which prudent persons are accustomed to rely in the course of their serious affairs. However, there was virtually no independent corroborating evidence to support Student J's version of events where it conflicted with the Respondent's version. Moreover, although governed by a different burden of proof and not determinative of the issues in this case, the jury verdict of acquittal in the prior criminal case in which Student J did testify further diminishes the probative value of the hearsay statements that Student J made to the police. Other evidence that was offered lacked even the identity of the

⁴⁷ In Re Wang, 441 N.W.2d 488, 492 (Minn. 1989).

⁴⁸ The Committee did not offer a transcript of the criminal trial, in which Student J did testify, for inclusion in this record. That failure apparently occurred because the district court ordered the record sealed after the Respondent was acquitted. Tr. Vol. 1, at 90. As noted in the Findings, Respondent was acquitted of the only criminal charge presented at trial. Even if the transcript were available, the trial outcome raises a significant question as to whether that evidence meets the standard for inclusion in a contested case record under the standards set by the Minnesota Supreme Court in *Falgren v. State, Bd. of Teaching*, 545 N.W.2d 901, 908 (Minn. 1996). Since that evidence was not offered, the ALJ will not address the issue here.

⁴⁹ Minn. R. 1400.7300, subp. 1.

author.⁵⁰ Finally, to the extent that the content of the conversations between the Respondent and Student J were preserved by other means—primarily through text messages, voicemail, and posting to a webpage—those conversations are ambiguous and lend little or no support to the claim that there was sexual contact between the Respondent and Student J.

On the other hand, none of the extrinsic evidence of conversations between the Respondent and Student J is inconsistent with the Respondent's version of events. Moreover, in her direct testimony, the Respondent specifically addressed some of the statements that Student J had made to the police suggesting that she and Student J had had an intimate relationship, including sexual contact, by indicating that some of Student J's statements were inaccurate or untrue.⁵¹ That direct testimony was not seriously challenged on cross-examination. The only instance of the Respondent not being completely forthright was telling the Chaska High School administrators that she had never met Student J outside the school premises. In summary, there was nothing inherently incredible about the Respondent's version of the events that culminated in her October 31, 2006, meeting with Student J. For these reasons, the ALJ concludes that the evidence offered by the Committee to establish the existence of a sexual relationship between the Respondent and Student J fails to meet the standard established in Wang. The ALJ therefore concludes that the Committee failed to establish sexual misconduct by the Respondent in her relationship with Student J by a preponderance of the evidence.

III. The Breadth of the Immoral Conduct Standard

The Committee argues that the evidence establishes that the Respondent engaged in "immoral conduct," even without a finding that explicit sexual contact occurred between Respondent and Student J. In earlier teacher licensing proceedings, it has been held that "the 'ordinary' meaning of the term immoral ... [is] defined as 'corrupt, indecent, depraved or dissolute, or conduct which offends the morals of the community in which it occurred." ⁵² In other words, "immoral conduct" is not confined to breaches of sexual mores. ⁵³

But as the Respondent points out, the case law supporting a broader immoral conduct standard involved conduct that was explicitly "sexual in nature" or was criminally or civilly actionable, such as "deceit/misrepresentation, fraud, conversion,

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⁵⁰ References to messages on Student J's MySpace page, for example, lacked the identity of the person who posted the message. Tr. Vol. 1, at 111-116 (Kleber). A witness indicated that posters of messages could be inferred from the content of the message. *Id.* at 115-116. This constitutes unreliable hearsay evidence that would be inadmissible in this proceeding and is therefore entitled to little weight.

⁵¹ See, e.g., Tr. Vol 2, at 457-461 (Lund).

⁵² Shaw v. Minnesota Board of Teaching, C0-00-2173 (Minn.App. June 5, 2001) (http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=mn&vol=appunpub%5C0106%5C2173&invol=1) (adopting the definition used in *In re the Proposed Revocation/Suspension of Teaching Licenses of Altonn*, 1998 WL 879168, at 9 (Minn. Off. Admin. Hrgs. Oct. 20, 1998) (http://www.oah.state.mn.us/aljBase/130211829.rp.htm).

⁵³ See Clarke v. Bd. of Education of School District of Omaha, 338 N.W.2d 272 (Neb. 1983).

theft by swindle, and multiple DUI convictions."⁵⁴ Nevertheless, the Committee maintains that "[s]everal jurisdictions have determined that e-mails, text messages, love letters, etc. constitute immorality even though there was no evidence of sexual contact."⁵⁵ However, the cases cited by the Committee involve teachers who initiated and sustained communications which were of an intimate and sexually suggestive nature. Moreover, in most of these cases, the conduct was explicitly sexual in nature. ⁵⁶

There were numerous conflicts between the Respondent's version of events and the account that Student J gave the police and, as discussed above, the ALJ concluded that the hearsay statements attributed to Student J lacked sufficient probative value to meet the Committee's burden. Nevertheless, even if one were able to take Student J's statements at face value, "[t]here was no sexual talk over the phones,"⁵⁷ and Student J reported nothing sexually suggestive in his version of the Respondent's communications until "[he] felt that something was going to happen because Lund was pushing for it by asking when they could meet up."⁵⁸ Student J's statement that there was no sexually suggestive talk between the Respondent and himself before a discussion about meeting outside school premises is completely in accord with the Respondent's version of events, and with respect to Student J's statement about which of them "pushed for a meeting," the ALJ has concluded that a preponderance of the evidence established that it was Student J, and not the Respondent, who kept asking for an outside meeting.

In short, a preponderance of the evidence supports the conclusion that it was the Respondent who was being pursued by a male student intent on establishing a physical, sexual relationship with her. She did not encourage that behavior. In every instance where the student explicitly expressed his desire for an intimate relationship, the Respondent insisted that no such relationship could occur. The evidence established that in the communications between the two of them that led to their

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⁵⁸ *Id*.

⁵⁴ Respondent Reply Brief, at 1-2.

⁵⁵ Committee Brief, at 16.

⁵⁶ Committee Brief, at 16 (citing ITMO Kelly C. Bowen, Docket No. 07.01-096257J (Tennessee State Board of Education Order issued December 21, 2007)(teacher initiated intimate conversations implying student would take care of teacher emotionally); Board of Education v. Lester, Docket No. 07.01-096254J (Tennessee State Board of Education Order issued September 3, 2008)(teacher initiated intimate conversations implying student could have sex with him in an airplane and received a text message picture from the student of her breasts [a practice known as "sexting"]); ITMO the Teaching License of Lemont Pouret Quiring, Docket No. 114535 (Oregon Teacher Standard and Practices Commission Order issued January 13, 2005)(teacher initiated frankly sexual conversations with 8th grade students, encouraged students to participate in adult chat rooms, and engaged in explicitly sexual instant messages with at least one student); Mulstay v. Board of Education of the Indian River School District, 2003 WL 23219646 (Del. Super. December 8, 2003)(teacher initiated numerous intimate conversations implying special relationship with student and on at least one occasion teacher initiated "sex talk."). Lehto v. Board of Education of the Caesar Rodney School District, 2008 WL 821525 (Del. Super. March 4, 2008)(teacher forming relationship with a student which became sexual after student/teacher relationship ended is sufficient to support discipline for immoral conduct); Shaw v. Minnesota Board of Teaching. supra (teacher exposed erect penis in public bathroom stall to foot tapping undercover police officer; misconduct sufficient to support two year suspension of teaching license for immoral conduct). ⁵⁷ Ex. 7 at p. 3.

October 31, 2006, meeting, the Respondent consistently attempted to discourage Student J from continuing to pursue her, and that she maintained further contact with Student J only to prevent hurt feelings. Again, as previously discussed, a preponderance of the evidence supported the Respondent's account of what occurred between her and Student J on October 31, 2006. Additionally, none of the communications between the Respondent and Student J were sexual or sexually suggestive in nature although, as discussed below, at least one of the Respondent's communications did improperly cross teacher-student boundaries. In summary, none of Respondent's communications with Student J at any time constitute immoral conduct as that term is defined.

IV. The Committee's Violation of Ethics Standards Claim

Minnesota law requires the Respondent to follow the ethics standards applicable to teachers, including the requirement that she "make reasonable effort to protect the student from conditions harmful to health and safety." In maintaining that Respondent violated that ethics rule, the Committee relied primarily on the testimony of Jim O'Connell, District Administrative Services Director for School District 112, and Jim Swearingen, Assistant Principal for Chaska Senior High School. Additionally, teachers who testified in this proceeding were asked for their opinions as to how the ethics standards relate to improper crossing of teacher-student boundaries.

In determining whether a licensed professional's conduct represents unprofessional conduct, Minnesota law relies on the consensus of the members of that profession. This issue was addressed in a contested case proceeding for the Minnesota Board of Psychology as follows:

For purposes of Minnesota Statutes, section 148.941, subdivision 2(a)(3) and Minnesota Rules, part 7200.5700, the term "unprofessional conduct" is defined in the same way in which the Minnesota Supreme Court defined it in *Reyburn v. Minnesota State Bd. of Optometry*, namely:

'Unprofessional conduct' is conduct which violates those standards of professional behavior which through professional experience have become established, by the consensus of the expert opinion of the members, as reasonably necessary for the protection of the public interest. In establishing the necessity for and the existence of such standards, every member of the profession should be regarded as an expert.

* * * There is a moral dereliction in failure by any member of a profession to apply in professional practice the standards which, by consensus of opinion in the profession, are necessary.

⁵⁹ Minn. R. 8700.7500, subp. 2.B.

⁶⁰ Tr. Vol 1. at 261-262 (O'Connell); Tr. Vol 2. at 326-329 (Swearingen).

What constitutes unprofessional conduct by an optometrist may be determined by those standards which are commonly accepted by those practicing the profession in the same territory.⁶¹

The *Reyburn* standard has been applied outside of the health licensing area.⁶² This method of determining the standards of professional conduct is appropriate for this proceeding.

Applying standards regarding boundaries in any particular case is difficult, because there is no one definition of what constitutes appropriate conduct. As described by a teacher in this proceeding:

It's just something, I guess that I know when I overstep, if I would be overstepping that boundary. I mean it's just professional relationship. You know, you keep your distance. You – you know, I certainly don't talk about personal issues with my husband or family issues. But trips, you know, or just going shopping at the grocery store. I don't know. It just is an issue that I don't worry about for me, so⁶³

Assistant Principal Swearingen described the purpose and benefits of maintaining appropriate boundaries between teachers and students:

[O]ne is to preserve your authority. There are situations that arise where you're either trying to teach students or you're trying to protect students where you need them essentially to comply relatively quickly with requests or with expectations so that the business of education can go on, whether it's classroom teaching or whether it's some sort of emergency situation where you need kids to, you know, respond very quickly because they might be in danger. So it preserves that sort of authority status, and it also simply protects kids from any sort of overly familiar kind of contact.⁶⁴

Mr. Swearingen then went on to describe where that boundary lies:

There's just a boundary, a line, that separates the role of the teacher or the role of the administrator and students. It involves not -- essentially not crossing personal boundaries, being overly familiar or overly solicitous, if I can use that word. It's a relationship that maintains basically the status difference between the adult and the child.⁶⁵

⁶⁴ Tr. Vol 2. at 326-327 (Swearingen).

⁶¹ ITMO the Psychology License of Michael A. Appleman, M.A., L.P. License No. LP 2613, OAH Docket No. 4-0907-11788-2 (ALJ Findings of Fact, Conclusions and Recommendation issued June 28, 2001), affirmed, Minn. Ct. App., Docket No. C6-02-142, WL 1544069 (July 16, 2002.

⁶² ITMO the Occupational License of Jeff L. Smith, OAH Docket Nos. RACE-87-001-PE and 4-2600-840-2 (ALJ Findings of Fact, Conclusions, and Recommendation issued October 1986)(Minnesota Racing Commission license application denial).

⁶³ Tr. Vol 2. at 410 (Hammann).

⁶⁵ Tr. Vol 2. at 326 (Swearingen).

As to whether the specific action of exchanging cell phone calls was considered within appropriate boundaries, Mr. Swearingen concluded that the answer was "generally no" because:

There might be situations I know of, for example, where on some sort of a field trip or on some sort of extended trip overseas or that sort of thing where there might be some necessity of the teacher or the chaperon, you know, having -- being able to be in cell phone contact with kids. It would still be sort of in that supervisory role that one would be able to do that, to be able to contact kids immediately. I wouldn't characterize it as sort of a personal contact. It's still within the realm of, you know, exercising one's professional duties.⁶⁶

Similarly it was his opinion that meeting a student alone outside of school was not categorically a boundary violation, but rather a situation that would require more inquiry.⁶⁷ Regarding exchanging text messages, Assistant Principal Swearingen stated:

Again, in general, I would say that's inappropriate. If it's of a personal nature, I can imagine -- because so many strange things happen in a school environment, I can imagine situations where you might need to do that. But again, not of a personal nature. It would still be within the professional bounds of supervision.⁶⁸

The Committee established by a preponderance of the evidence that a standard of professional conduct for communications between teachers and students is that any form of communication may be used, but the communications must further the educational purpose of the teacher/student relationship and must avoid personal topics that impair the status difference between the adult and the child.

Respondent provided Student J with the means of communicating with her outside of school. Standing alone, that did not violate professional boundaries. Conduct of that nature becomes inappropriate, crosses over professional boundaries, and violates the ethics code when the resultant communications do not serve an educational purpose but rather involve personal topics that impair the status difference between the adult and the child.⁶⁹ The ALJ concludes that the Respondent's communications with Student J failed to meet the boundary standards for teachers.

The Committee has the burden establishing by a preponderance of the evidence facts that support discipline of the Respondent's license. With regard to the sexual conduct and immoral conduct claims, the ALJ has concluded that the Committee failed that burden, primarily because contradictory hearsay statements attributed to Student J lacked sufficient probative value. By contrast, the Committee was able to substantiate

⁶⁶ Tr. Vol 2. at 327-328 (Swearingen). ⁶⁷ Tr. Vol 2. at 328 (Swearingen).

⁶⁸ Tr. Vol 2. at 328 (Swearingen).

⁶⁹ Tr. Vol 1. at 271 (O'Connell).

its violation of ethics claim by the substance of uncontroverted text messages and the Respondent's own testimony.

The Respondent became obliged to act to preserve and protect the teacher-student boundaries between herself and Student J when she became aware of Student J's desire for a sexual relationship and that Student J would not discontinue his pursuit of such a relationship after Respondent's refusals. However, the Respondent recognized and admitted that in several instances that her communications with Student J created a situation that was ambiguous, and that could be understood to be a romantic relationship—that is, that her communications tended to blur the status difference between her, as an adult, and Student J, as an adolescent.

The expert testimony of teaching professionals established that when teacherstudent communications threaten boundaries, a teacher must redirect personal inquiries from a student to educational, nonpersonal topics. When a student does not respond to that, the teacher must enlist the assistance of other teachers and school administrators to obtain the student's compliance. A teacher's concern about how such a request for assistance might be taken by colleagues or result in some other negative outcome does not alter the standard that the teacher must maintain appropriate boundaries. Here, rather than seek assistance from other teachers or administrators, the Respondent continued to have conversations with Student J that were likely to encourage his desire for a sexual relationship and support his belief that an opportunity for such a relationship was possible. Those errors culminated in the Respondent's agreeing to meet Student J alone outside of school, which is itself a failure to maintain appropriate boundaries under the circumstances in this case. The Respondent's failure to seek assistance constituted a violation of an ethical standard that was designed to protect Student J from further harm through his continued pursuit of the Respondent. Moreover, by pursing the course she took, the Respondent triggered events that led to criminal charges being brought against her.

Most notably, after discovering that Student J had not been truthful with her about not having a girlfriend, the Respondent sent Student J a text message on November 30, 2006, that clearly violated teacher-student boundaries. Both the Respondent's description of the reasons for that text message and the substance of the message itself established a communication that blurred the status difference between her, as an adult, and Student J, as an adolescent. There was no legitimate educational reason for that text message and sending that text message alone was a clear violation of Minn. R. 8700.7500, subp. 2.B.

V. Conclusion

The ALJ concludes that none of the Respondent's interactions with Student J constituted prohibited sexual conduct or "immoral conduct" within the meaning of Minn. Stat. § 122A.20. The ALJ therefore recommends that the Board impose no discipline on the Respondent's license on either of those grounds. On the other hand, the ALJ

⁷⁰ Tr. Vol 2, at 491-492 (Lund).

concludes that the Respondent did violate her ethical obligation under Minn. R. 8700.7500, subp. 2.B. by failing to maintain appropriate boundaries between herself and a student and thereby failing to make reasonable effort to keep that student from harm. The ALJ therefore recommends that the Board impose such discipline on the Respondent's teaching license as it considers appropriate under the circumstances.

B. H. J.